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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/637,101	08/08/2003	Ernesto Buriani	7202-45	5079

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EXAMINER
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PEARSE, ADEPEJU OMOLOLA

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 01/27/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	Application No. 10/637,101	Applicant(s) BURIANI ET AL.	
	Examiner Adepeju Pearse	Art Unit 1761	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is FINAL.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-14 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-14 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All    b) ☐ Some \* c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                        | 4) <input type="checkbox"/> Interview Summary (PTO-413)                     |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)               | Paper No(s)/Mail Date. ____   |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| Paper No(s)/Mail Date ____   | 6) <input type="checkbox"/> Other: ____                                     |

## DETAILED ACTION

### *Claim Rejections - 35 USC § 112*

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter, which the applicant regards as his invention.

2. Claim 4 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Regarding claim 4, the phrase "such as" renders the claim indefinite because it is unclear whether the limitations following the phrase are part of the claimed invention. See MPEP § 2173.05(d).

### *Claim Rejections - 35 USC § 102*

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) The invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

4. Claims 1-~~3~~<sup>12</sup>, 11, 14 are rejected under 35 U.S.C. 102(b) as being anticipated by Doster et al (U.S. Pat. No. 4,283,430). With regard to claims 1-2, Doster et al disclose a method for preparing tubular as in claim 14 center filled products comprising a batter sheet that is thermoplastic having a thickness in the range of between 1/16inches to 5/32inches (col 33-39), which by conversion is (about 1.5 to about 4mm), a partially baked sheet having a moisture content of about 15% to 25% wt as in claim 2 (col 3 lines 54-55). An edible filling material is deposited into the center of the baked tube. The nature of the filling material may vary depending on the intended use of the product; a viscous material is preferred such as confectionery crème

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(col 7 lines 21-26). The continuous thermoplastic sheet is rolled around to forma tube (abstract) and the batter is baked at a temperature of from about 275°F to 550°F(135°C to 287°C) depending on the formulation of the batter, the time of baking may range from a few seconds to 10minutes (col 4 lines 1-12) and the baked dough sheet has a moisture content reduced to about 5% or less (col 3 lines 58-60) and upon cooling becomes crisp and retains its shape (col 3 lines 60-68).

5. With regard to claims 3, 6 and 11, Doster et al disclose a filling material having a water activity of no more than 0.2. It is inherent that this filling is anhydrous because it is well known in the art that a water activity level of 0.2 is found in very dry foods.

6. With regard to claims 4 and 12, Doster et al disclose a filling material containing granulated sugar (col 7 lines 67-68, col 8 line 1).

7. With regard to claim 5, Doster et al disclose a method for preparing tubular center filled products by a continuous process (abstract) comprising a batter sheet that is thermoplastic having a thickness in the range of between 1/16inches to 5/32inches (col 33-39), which by conversion is (about 1.5 to about 4mm), a partially baked sheet having a moisture content of about 15% to 25% wt as in claim 2 (col 3 lines 54-55). The continuous thermoplastic sheet while warm and pliable is rolled around its longitudinal axis to form a continuous tube having a closed longitudinal, non-overlapping seam (abstract). An edible filling material is deposited into the center of the continuous baked tube as it is formed (abstract). The nature of the filling material may vary depending on the intended use of the product; a viscous material is preferred such as confectionery crème (col 7 lines 21-26). The continuous thermoplastic sheet is rolled around to forma tube (abstract) and the batter is baked at a temperature of from about 275°F to

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550°F(135°C to 287°C) depending on the formulation of the batter, the time of baking may range from a few seconds to 10minutes (col 4 lines 1-12) and the baked dough sheet has a moisture content reduced to about 5% or less (col 3 lines 58-60) and upon cooling becomes crisp and retains its shape (col 3 lines 60-68). The filled tube is cut into pieces of a desired length (abstract).

8. With regard to claim 7, Doster et al disclose that the batter is carried between a pair of spaced-apart moving heated surfaces (abstract).

9. With regard to claim 8, Doster et al disclose tube forming means to roll the continuous sheet around its longitudinal axis until the edges of the sheet are butted together to thereby form a continuous tube having a longitudinal, butted or non-overlapping seam (col 2 lines 45-49, see fig.7).

### ***Claim Rejections - 35 USC § 103***

10. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

11. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.

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4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

12. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

13. Claim 4 is rejected under 35 U.S.C. 103(a) as being unpatentable over Doster et al (U.S. Pat. No. 4,283,430) in view of Gonzalez et al (U.S. Pat. No. 6,146,672). Doster et al failed to disclose incorporating granulated ingredients including hazel nuts, almond, etc in the filling material. However, Gonzalez et al teach dough products filled that may comprise nuts as flavor materials (col 8 lines 47-50). It would be obvious to one of ordinary skill in the art to modify Doster et al with Gonzalez et al by incorporating nuts as flavor materials in the filling composition of the dough product.

14. Claims 9-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Doster et al (U.S. Pat. No. 4,283,430) in view of Harrop (U.S. Pat. No. 6,530,768). Doster et al disclose that the filled dough product is cut using any suitable cutting means such as a reciprocating knife, rotary cutting blade, water knife, etc (col 8 lines 33-39). However, Doster et al failed to disclose cutting ultrasonically. Harrop teaches an ultrasonic cutting system utilized in cutting snack products, filled dough products, etc (col 3 lines 22-25) while minimizing the tendency of the

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cutting blade to fracture (col 1 lines 64-66). It would have been obvious to one of ordinary skill in the art to modify Doster et al with Harrop by utilizing an ultrasonic system for cutting thicker products while minimizing the tendency of the cutting blade to fracture.

15. Claim 13 is rejected under 35 U.S.C. 103(a) as being unpatentable over Doster et al (U.S. Pat. No. 4,283,430). Doster et al failed to disclose a weight ratio range for the cream/particulate. However, Doster et al disclose a filling material containing about 20 to 50% by weight sugar such as granulated sugar, which by applicant discloses as a particulate (see spec. pg. 8 lines 21-23). It would be obvious to expect that this weight % is within applicant's recited range.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Adepeju Pearse whose telephone number is 571-272-8560. The examiner can normally be reached on Monday through Friday, 8.00am - 4.30pm.


If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



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